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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RODRIGUEZ,

Defendant and Appellant.

B213413

(Los Angeles County
Super. Ct. No. BA284777)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Reversed in part and affirmed in part with directions.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Rodriguez was convicted by a jury of one count of murder (count 1) and one count of assault with a firearm (count 2). The jury found gang and firearm allegations to be true. Rodriguez contends there was insufficient evidence of his present ability to commit an assault with a firearm. He also contends he was denied due process by imposition of a firearm enhancement on count 2, which was not charged in the information. We reject the former but agree with the latter contention. Accordingly, we reverse the firearm enhancement on count 2. We also direct the trial court to correct the award of presentence custody credits, as agreed to by both parties.

BACKGROUND

I. Evidence of Crimes

On March 29, 2005, defendant Michael Rodriguez visited 11th Place in Los Angeles. He and his mother used to live in that neighborhood but they had moved away. The area was previously claimed by the “Street Criminals,” the gang to which Rodriguez belonged. In March 2005, however, the area was controlled by another gang, “18th Street.” The particular part of 11th Place that Rodriguez visited that night had been the last remaining piece of Street Criminals’ territory before 18th Street completely pushed the other gang out of the area. Rodriguez frequently came back to his old neighborhood.

In the evening, on that day, Omar Sanchez saw Rodriguez on 11th Place. Sanchez was at his family’s home, which was across the street from where Rodriguez and his mother used to live. Sanchez had known Rodriguez for many years, and believed that Rodriguez was a Street Criminals gang member. Rodriguez was with a man whom Sanchez did not know. Sanchez spoke to Rodriguez for five to ten minutes that evening. Sanchez saw Rodriguez putting graffiti on walls outside. Rodriguez later admitted to the investigating detective that he had been spray painting the area with Street Criminals graffiti.¹

¹ Rodriguez’s fingerprints were lifted from a can of spray paint that police found in the area where the crimes were committed.

Later, around 9:00 p.m., Victor Ramirez left his home on 11th Place to go outside to his car. Three men carrying guns surrounded him. One man was holding a handgun (described as a revolver or pistol), another had a shotgun, and the third had a military-style firearm described as a “goat’s horn.” According to Ramirez, the military-style gun looked like the MAK 90 Sporter firearm that was later recovered from the home of Rodriguez’s mother, along with some ammunition. The prosecution’s theory was that Rodriguez was the man holding the military-style firearm, although Ramirez was not able to identify him.

The man with the handgun asked Ramirez, “Where are you from, puto?”², and also commented that they had never seen Ramirez before. The man who was holding the military-style firearm—Rodriguez, according to the prosecution—had his right hand on the trigger and his left hand close to the barrel of the gun. He held the gun up against the right side of his body and moved the gun from side to side as he moved his whole body. Ramirez told the men: “I live here, and I don’t belong to the barrio.” The men said, “okay” and let him pass.

Ramirez got in his car and drove to a convenience store. About five minutes later, he returned home. As he approached his home, one of the men asked him if he lived there. Ramirez said that he did. Ramirez then saw the men running up and down the street, still carrying their guns and shouting, “We are back, Street Criminals.” Before Ramirez went to the store, some of his neighbors were outside in front of their homes. When he returned from the store, none of them were outside anymore. Ramirez saw the three men run down the street. About five minutes later, as he was standing on the steps of his home, he heard a loud noise “like a firearm.”

Rene Velasquez witnessed the shooting that occurred on March 29, 2005, on 11th Place. He spoke with detectives shortly after the shooting during an audio-taped

² The Spanish language interpreters at trial translated the word “puto” as “the male version of ‘bitch’” or “faggot.”

interview.³ Velasquez and two friends were walking on 11th Place. Velasquez saw Rodriguez and another man sitting in a black pick-up truck.⁴ Velasquez recognized both men. He knew that Rodriguez and the other man were Street Criminals gang members, and he knew their gang monikers.⁵ Rodriguez was in the driver's seat. He pointed a long gun out the window at Jose Galiciaumana, a man whom Velasquez knew as an 18th Street gang member. Rodriguez yelled out to Galiciaumana, "Where you from?" Galiciaumana replied, "18th Street." The other man with Rodriguez got out of the front passenger seat of the pick-up truck, and fired one shot at Galiciaumana. Velasquez described one of the guns he saw as a "horn of a goat," which is "an assault-type weapon." The victim died at the scene from a shotgun wound to the abdomen.

Omar Sanchez, who had gone inside his family's home to eat dinner after he talked with Rodriguez, heard the gunshot. He went outside and saw the victim's body lying near a driveway where his car was parked. The windows of the car were rolled down. As Sanchez walked by his car, he saw a "rifle" on the passenger seat.⁶ He "got scared" and left the scene in his car. Sanchez was heading toward his home when Rodriguez called him on his cell phone. Rodriguez said that he had left a weapon in Sanchez's car, and he asked Sanchez to bring it to him. Sanchez drove over to Rodriguez's mother's home and gave the rifle to Rodriguez.⁷

³ At trial, three years after the crimes, Rene Velasquez stated that he did not know anything about the shooting. The trial court allowed detectives to testify about their interview with Velasquez, and permitted the prosecution to play portions of the audio-taped interview for the jury.

⁴ During a search of Rodriguez's mother's home, police saw a black pick-up truck that was registered in the names of Rodriguez's parents.

⁵ Velasquez identified Rodriguez and the shooter in six-pack photo lineups.

⁶ At trial, Sanchez identified the firearm that police recovered from Rodriguez's mother's home as the "rifle" he saw in his car.

⁷ Sanchez testified at trial under a grant of immunity. He was arrested for a crime not related to this case. After being prompted by a detective who said he already was aware of Sanchez's role in these crimes, Sanchez confessed his part.

After Rodriguez was arrested for these crimes, his conversations with his cellmate were audio-recorded. Portions of the audiotape were played for the jury and admitted into evidence, along with a translation of these conversations, which were partially in Spanish and partially in English. Rodriguez discussed the shooting. He talked about walking with his “AK,” and then putting it in “Little Puppet’s” car and having Little Puppet bring the weapon to him.

In these jail cell recordings, Rodriguez also explained why he went to 11th Place that night. He said that he intended to “mop . . . up,” meaning cover the area with graffiti. He also planned to “get posted with a gun,” meaning that he would stand guard on 11th Place, in rival gang territory. He alluded to what would happen if he came into contact with a rival gang member: “a little war there.” Rodriguez also stated that, after his associate shot the victim, he (Rodriguez) yelled after another 18th Street gang member who ran away, “Street Criminals, dog, my ‘hood!” Rodriguez indicated he was surprised that his associate shot the victim.

II. Verdicts and Sentencing

The jury convicted Rodriguez of first degree murder (Pen. Code,⁸ § 187, subd. (a)), and found true the allegations that a principal “personally and intentionally discharged a firearm” (§ 12022.53, subds. (c)-(e)(1)), a principal “personally used a firearm (§ 12022.53, subds. (b) & (e), and the “offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members” (§ 186.22, subd. (b)(1)(C)).

The jury also convicted Rodriguez of assault with a firearm (§ 245, subd. (a)(2)), and found true a gang allegation (§ 186.22, subd. (b)(1)(B)), and also that Rodriguez “personally used a firearm” (§ 12022.5, subds. (a) & (d)). The firearm allegation for this count was not charged in the information or amended information.

⁸ All further statutory references are to the Penal Code.

On the murder, the trial court sentenced Rodriguez to 25 years to life and imposed a 25-year firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). On the assault with a firearm, the court sentenced Rodriguez to a consecutive term of four years: one-third the middle term of three years for the offense, plus one year and four months for the firearm enhancement under section 12022.5, subdivisions (a) and (d), and one year and eight months for the gang enhancement under section 186.22, subdivision (b)(1)(B). The court stayed all of the other enhancements.

DISCUSSION

I. Sufficiency of Evidence of Assault with a Firearm

Rodriguez contends that his conviction for assault with a firearm is not supported by substantial evidence demonstrating that he had the “present ability” to commit the crime. We disagree.

Section 240 defines assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Rodriguez argues, if the gun was not loaded, he did not have the present ability to commit an assault with a firearm under section 245, subdivision (a)(2). As our Supreme Court has acknowledged, “A long line of California decisions holds that an assault is not committed by a person’s merely pointing an (unloaded) gun in a threatening manner at another person.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3.)⁹ “The threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury.” (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)¹⁰ Rodriguez challenges the sufficiency of the evidence indicating that the firearm was loaded.

⁹ In *People v. Rodriguez*, the California Supreme Court declined to address the “continuing viability of this rule.” (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11, fn. 3.) Thus, we disagree with the People’s assertion that “the rule is no longer viable.”

¹⁰ There is no evidence that Rodriguez attempted to use the gun as a club or a bludgeon. (*People v. Fain, supra*, 34 Cal.3d at p. 357, fn. 6 [“even an unloaded gun can be used as a club or bludgeon”].)

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] “‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,], which must be convinced of the defendant’s guilt beyond a reasonable doubt. “‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”’ [Citations.]” [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Rodriguez concedes that circumstantial evidence, including evidence of a defendant’s conduct, may be sufficient to prove that a gun was loaded. (See *People v. Rodriguez, supra*, 20 Cal.4th at p. 13.) “‘The acts and language used by an accused person while carrying a gun may constitute an admission by conduct that the gun is loaded.’ [Citations.]” (*Ibid.*) Evidence of Rodriguez’s conduct during the confrontation with Ramirez indicates that Rodriguez was prepared to fire his gun. He held his right hand on the trigger and his left hand near the barrel of the gun. He swung the gun from side to side, making Ramirez aware of the weapon. Rodriguez highlights the lack of evidence that he and his associates expressly threatened to shoot or kill Ramirez. They did threaten Ramirez, however, with the words, “Where are you from?” The jury was

presented with evidence of what happened when Rodriguez asked that question to another victim (Galiciaumana), and that victim gave the “wrong” answer (“18th Street”).

Rodriguez speculates that perhaps only the shooter’s gun was loaded. There is substantial circumstantial evidence from which the jury could have inferred that Rodriguez’s weapon was loaded. Rodriguez went into rival gang territory with the intention of covering the area with his gang’s graffiti (which he did). He anticipated that if he came into contact with an 18th Street gang member, there might be “a little war there.” He and his associates ran up and down 11th Place, announcing that the Street Criminals “are back,” encouraging such a war. It would have been reasonable for the jury to conclude that Rodriguez would not go into a battle ground with rival gang members with an unloaded weapon. (See *People v. Rodriguez, supra*, 20 Cal.4th at p. 12.) Based on his own words, Rodriguez was prepared to “get posted with a gun”—or stand guard—on 11th Place that night. The logical inference is that he planned to stand guard with a loaded weapon. There is substantial evidence demonstrating that Rodriguez had the “present ability” to commit an assault with a firearm on Ramirez.

II. Firearm Enhancement on Count 2

Rodriguez contends that the true finding on the firearm allegation in count 2 must be reversed because the firearm enhancement was not charged in the information. We agree.

Section 12022.5, subdivision (d), provides for the imposition of a personal use firearm enhancement “for any violation of Section 245 if a firearm is used.” Section 1170.1 requires that “[a]ll enhancements be alleged in the accusatory pleading.” (§ 1170.1, subd. (e).) “[A] defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.)

Neither the information nor the amended information included a special allegation that Rodriguez personally used a firearm, within the meaning of section 12022.5, during the assault with a firearm. At trial, the prosecutor never requested that the trial court further amend the information to allege the firearm enhancement in count 2.

Using CALCRIM No. 3146, the trial court instructed the jury that if it found Rodriguez guilty of assault with a firearm, it was required to decide whether the People had proved the “additional allegation” that Rodriguez personally used a firearm in the commission of the crime. On the verdict form for count 2 for assault with a firearm, the jury indicated that it found true the allegation that Rodriguez personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d).

The facts giving rise to this enhancement do not appear in the information or amended information. To commit an assault with a firearm, one need not personally use a firearm. An aider and abettor, who is not in possession of a gun, can commit an assault with a firearm. The information did not provide Rodriguez with notice that he was being charged with a personal use firearm enhancement on count 2. Accordingly, the firearm enhancement under section 12022.5, subdivisions (a) and (d), must be reversed and stricken.¹¹

III. Imposition of Sentence for Gang and Firearm Enhancements on Count 2

Rodriguez contends that the trial court erred in imposing sentence on count 2 for both the gang enhancement under section 186.22, subdivision (b)(1)(B), and the firearm enhancement under section 12022.5, subdivisions (a) and (d). The People agree that the trial court should not have sentenced Rodriguez on both enhancements because they are both based on his personal use of a firearm, and that the trial court should have imposed “only the greatest of those enhancements,” in this case the gang enhancement. (§ 1170.1, subd. (f).) The issue is moot given our conclusion that the firearm enhancement on count 2 must be reversed and stricken.

¹¹ Rodriguez also argues that his counsel was ineffective in failing to object to the jury instruction (CALCRIM No. 3146) and the verdict form on the ground that the firearm enhancement allegation was not charged in the information and should not have been submitted to the jury. We disagree with Rodriguez that he can establish a claim for ineffective assistance of counsel. As set forth below, Rodriguez could not be sentenced to the firearm enhancement on count 2, in addition to the gang enhancement, as the People concede. This might have been the reason the prosecution did not charge the firearm enhancement.

IV. Presentence Custody Credit

Rodriguez contends, and the People agree, that he is entitled to one additional day of presentence custody credit under section 2900.5. The trial court awarded Rodriguez total custody credits of 1,313. The parties agree that Rodriguez is entitled to 1,314 days of custody credit. We order that the award of presentence custody credits be modified accordingly.

DISPOSITION

The enhancement imposed on count 2 under Penal Code section 12022.5, subdivisions (a) and (d), is reversed and stricken. The award of presentence custody credits is modified to reflect that Rodriguez's custody credits are 1,314 days. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.